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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 652

GRACE CORSO,

Appellant,

vs.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a National Banking Association, as Executor of the Estate of Walter P. Story, also known as W. P. Story, and also known as Walter Perry Story, Deceased,

Appellee.

Appeal From the District Court of Appeal, Second Appellate District State of California.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

GRACE CORSO,
1601 North Kings Road,
Los Angeles 46, California,
Appellant pro se.

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Appellee.

Appeal From the District Court of Appeal, Second Appellate District State of California.

BRIEF IN OPPOSITION TO MOTION TO DISMISS.

Appellant, Grace Corso, files this brief in opposition to Motion to Dismiss by appellee, Security-First National Bank of Los Angeles, as Executor of the Estate of Walter P. Story, also known as W. P. Story, and also known as Walter Perry Story, Deceased.

The Federal Questions Are Substantial.

1. Appellant Was Deprived of Her Property Without Due Process of Law in Violation of the Fourteenth Amendment of the United States Constitution, When She Was Prohibited From Putting on Her Case While Defendant Was Permitted to Put on Its Full Case Whether Decedent Story Was Dead or Alive.

As pointed out in appellant's Statement of Jurisdiction, this appeal is directed toward the application of California Code of Civil Procedure, section 1880(3), as it was made by the highest courts of California, to this case. *Dahnke-Walker v. Bondurant*, 257 U. S. 282, 289, 42 S. Ct. 106, 108, authorizes that, on the principle that a statute may be invalid as applied to one state of facts and yet valid as applied to another. By way of incidental reasoning and argument, the statute generally becomes material.

Appellee in its Motion to Dismiss cites extensively from and relies heavily upon, *Wright v. Wilson*, 154 F. 2d 616, which case was decided by the Circuit Court of Appeals, Third Circuit, in 1946, and thereafter certiorari was denied by this Court. The *Wright* case, covers the general rule, but is not the same as this case. In the *Wright* case, the action was for injuries sustained by plaintiff "when he was struck by a motor car operated by the defendant," (at p. 617). In other words this was a transaction or accident in which the defendant took a personal hand. Then, "while the litigation was pending defendant died." In the instant case, the defendant was not present, did not have any personal transaction or accident with plaintiff, and did not have any hand whatsoever in plaintiff's injury, other than by owning the building in which she was injured, as an individual. Likewise, this defendant died pending trial.

The *Wright* case sets forth the history of the doctrine of Dead Man's Statutes, most of which appellee quotes from the case. However, appellee does not also mention that at page 620, of the case, the court said:

> "We reach the result without enthusiasm. The rule excluding a survivor's testimony seems to stand in the almost unique position of being condemned by all of the modern writers on the law of evidence. It is said to be as unsound and undesirable as the rule excluding the testimony of parties of which the survivor rule is a part."

As a footnote to this, the court quotes from Professor Wigmore, 2 Wigmore on Evidence, 3rd Ed. 1940, 697, sec. 578, as follows:

> "As a matter of policy, this survival of a part of the now discarded interest-qualification is deplorable in every respect; *for it is based on a fallacious and exploded principle,* it leads to as much or more false decision than it prevents, and it encumbers the profession *with a profuse mass of barren quibble over the interpretation of mere words.*" (Italics added).

The instant case is more extreme than the *Wright* case, and more extreme than Wigmore had in mind in his quotation; in fact, this case is the most extreme case possible.

Stated briefly and simply, but accurately and completely, although succinctly: Plaintiff-appellant, knew whether there was water on the hallway floor upon which she fell and severely injured herself, but could not testify; the decedent did not know whether there was water on the hallway floor or not, of his own knowledge, not being present; and, decedent's servant and agent, Gonzales, knew

the same as plaintiff-appellant whether there was water on the hallway floor, and was permitted to testify fully. These were the only parties involved. Plaintiff's witness O'Brien was used in an effort to save the cases because plaintiff could not testify. Her testimony neither added to, nor subtracted from, the body of evidence in the case, as her observations were two indefinite and uncertain. Thus, plaintiff was in the same position as if that witness had not been called.

The testimony of water in the hallway was small in volume in the total evidence in the case, but made the difference between defeat and victory for plaintiff, between having her rights on one hand and being deprived of them on the other. The jury asked to have plaintiff's deposition reread to ascertain "whether or not (appellant testified) there was water in the hall outside the door of the rest room" [Rep. Tr. p. 159, lines 13-15.] She was not permitted to so testify and thus was deprived of her day in court or her right to put on her case. This states simply the same problem as set forth in appellant's Jurisdictional Statement of the Questions Presented which were of Substantial Constitutional Nature.

Is it "fair play" for decedent's agent to testify, but prohibit plaintiff from testifying, when they were the only two eye-witnessess. Is it "fair play" for one boxer to enter the ring bound and gagged to fight an opponent who has freedom of motion? Is it "fair play" to permit one baseball team to put 18 players on the field and permit the opponent only 9 players? Is it "fair play" to permit decedent and his estate to have the advantage of all his evidence he would have when alive, but deny plaintiff evidence automatically because of decedent's death? It was as if justice was rigged or stacked against plain-

tiff because she was unfortunate enough to be injured in the building of a defendant who died, owning large properties as an individual. Is that "fair play"? The California statute is crude and all inclusive; it aimed at certain supposed evils but with blunderbuss effect hits innocent bystanders. The defendant could run and own a taxi service with hundreds of vehicles on the street at all times, and an innocent pedestrian could receive severe injuries due to the negligence of one of the drivers. Plaintiff cannot testify if the owner dies, although he was not present when the accident occurred. Or, defendant might be a building contractor and some of his workmen negligently drop material on an innocent passerby. When defendant dies, plaintiff cannot even testify that he was on the street when hurt. The results as set forth in the instant case, and the two last illustrations follow from the fact that the defendant owns an operation of large magnitude as an individual, and never saw fit to incorporate. It is hard to believe that this was ever in the contemplation of the framers of this statute over eighty years ago. The California Supreme Court has, in this case, held that it was. Thus, this interpretation is accepted by this Court. Thus, is it "fair play" under our philosophy of government as set forth in the Fourteenth Amendment of the United States Constitution and interpretations hereof? There are some political philosophies in the world today where "fair play" is not an element, but not in our judicial and political tradition.

Appellee's Motion for Dismissal utters platitudes without stating reasons, as on pages 8 and 9:

> "The matter primarily is one for the Legislature and the Court will not interfere, even though it disagrees with the necessity therefore, *unless it clearly*

and without doubt appears that there is no reasonable basis for the classification made." (Italics added.)

What are the reasonable bases in this case? Appellee has never suggested any, except "to put the plaintiff on an 'equal footing,'" or "to protect the estate from possibility of fraud, perjury, and injustice," etc. (page 14). None of these apply in this case, but work in reverse, and perpetuate a fraud on plaintiff-appellant, and put decedent on a superior footing. Appellee, further, on page 14, says "the legislature has the right to determine the matter of competency, particularly where, *as here*, a rational basis exists therefor." What rational basis? Appellee sees fit to keep it from appellant and the Court. Appellee's quotations on page 13, that the Fourteenth Amendment is not violated because "incompetent witnesses" were not permitted to testify, begs the question, and assumes a fact not proven. This also overlooks the fact that a party just cannot use another witness if one isn't competent; witnesses usually aren't that plentiful; but most frequently one witness makes or breaks a case, especially the party plaintiff himself or herself in a personal injury action.

On page 9, appellee says,

> "The California Legislature *has wisely and upon grounds of public policy* determined that the common law disqualification of incompetency of a party to testify as a witness in an action or proceeding has cause to remain where the action or proceedings is against an executor or administrator upon a claim or demand against the estate of the deceased person." (Italics added).

That statement is apparently agreed with only by appellee and some very old cases, but not by *Wright v. Wilson, supra*, and current authorities on evidence.

Appellee's reference to California Code of Civil Procedure, section 956(2), enacted in 1949, is immaterial to this case; we are concerned with the application of section 1880(3) of the same code. That is the California Dead Man's Statute, and its application to the facts of this case. The case could have just as well been one lying in contract as tort, without any difference in the problem. Plaintiff could have made a contract with decedent's agent as the sole negotiator. Plaintiff could not testify, but the agent could because of decedent's death although decedent knew nothing of the transaction except his instructions to his agent and the agent's report to him.

Appellee says, on page 12, that "Appellant is not precluded from prosecuting the action but only is precluded from presenting as a witness one whom the Legislature has declared to be incompetent as a witness." The avowed purpose of Code of Civil Procedure, section 1880(3), is to prevent frauds on decedent's estates. This section wouldn't be necessary if there were a half-dozen witnesses, and, inversely, if there were a half-dozen witnesses plaintiff could prove her case in spite of this section. The statute was meant to bar cases, as it effectually does in the great majority of cases, and in this case. It is "quibble over the interpretation of mere words," as Wigmore said. The question is: What is the result in this case? What reasonable justification for it, or public policy for it, exists in this case? Appellant can find none, and none has been suggested by appellee. Therefore appellant was deprived of her property and personal rights

without due process of law in contravention of the Fourteenth Amendment of the United States Constitution.

Appellee, says on page 5, that because all of the States in the Union have a "Dead Man's Statute" that "good and substantial reasons exist" for them. The fact is that the instant case would not arise under these statutes. Only Idaho and Nevada have a statute like California making no restriction to "personal transactions" or similar words. Nevada by decision has interpreted its statute to permit plaintiff to testify to everything except that which occurred when decedent was present. See *Zeigler v. Moore* (Nev.), 335 P. 2d 425 (1959). Idaho has been presented with no such case. Of the states with different statutes from California's, only Vermont and Mississippi appear to make no express provision for a situation where there was no personal transaction or conversation between the claimant and the decedent, but all contact was with decedent's agent.*

Thus, if no apparent reason or rational basis exists for the Dead Man's Statute, as almost all of the modern authorities of evidence witness, then *a fortiori* that is true in this case where decedent was not present, knew nothing about the transaction, his estate was deprived of no evi-

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*Alabama Code 1940, Tit. 7, Sec. 433; Arizona Code 1939, Sec. 23-105; Arkansas Const. Schedule, Sec. 2; Colorado Stat. 177, Sec. 2; Connecticut Rev. Gen. Stat., Sec. 5608; Delaware Code, Tit. 10, Sec. 4302; Florida Stat., Sec. 90.05; Georgia Code, Sec. 38-1603; Idaho Code, Sec. 9-202; Illinois, S-H Ann., chap. 51, Sec. 2; Indiana, Burns Stat., Sec. 2-1717; Iowa Code, Sec. 622.4; Kansas Gen. Stat., Sec. 60-2804; Kentucky Rev. Stat., Sec. 421.210(2); Louisiana Civ. Code, Sec. 2282; Maine Rev. Stat., Sec. 113-119; Maryland Const., Art. 35, Sec. 3; Massachusetts Ann. Laws, chap. 233, Sec. 65; Michigan Comp. L., Sec. 617.65; Minnesota Stat. Ann., Sec. 595-04; Mississippi Code, Sec. 1690; Missouri Rev. Stat. Ann., Sec. 491.010; Montana Rev. Code, Sec. 93-701-3, sub. 3; Nebraska Comp. Laws, Sec. 8906; Nevada Rev.

dence, and was fully able to protect itself from fraud to the same extent as if decedent were alive. If we look at the problem generally, assuming these statutes are constitutional, then it is easy to say plaintiff is unfortunate but it is up to the legislature to change the law; but if one looks at the facts of this case, the stark and flagrant absurdity of the application of this statute, the sense of fairness of any fairminded person is aroused.

2. Appellant Was Deprived of Equal Protection of Her Property Rights With Defendant, and With Other Plaintiffs, in Violation of the Fourteenth Amendment of the United States Constitution.

There is no more apparent reason or rational basis for the plaintiff-appellant here to be treated differently than the defendant-appellee here, or differently than any ordinary plaintiff in any action, than there was for plaintiff-appellee here to be denied due process, as discussed under the first Question Presented above. Appellant is not claiming preferment over other victims of Dead Man's Statutes, or claiming that she is being treated differently than other victims of this type of statute. She is complaining because she is put under this blight, because no reason or rational basis exists for her to be

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Stat., Sec. 48.030; New Hampshire Rev. L., chap. 392, Sec. 25; New Jersey Stat. Ann., 2A:81-2; New Mexico Comp., Sec. 20-2-5; New York, Civ. Prac. Act, Sec. 347; North Carolina Gen Stat., Sec. 8-51; North Dakota Rev. Code, 31-0103; Ohio Rev. Code, Sec. 2317.03; 12 Oklahoma, Sec. 384; Oregon C. Laws, Sec. 3-102; 28 Pennsylvania Stat., Sec. 322; Rhode Island Gen Laws, Chap. 538, Sec. 6; South Carolina Code, Sec. 26-402; South Dakota Code, Sec. 36.0104; Tennessee Code, Sec. 9780; Texas, Vernon Ann. Civ. Stat., Art. 3716; Utah Code, Sec. 104-49-2; Vermont, Ann. Stat., Tit. 12, Sec. 1602; Virginia Code, Sec. 8-286; Washington, Rem. Rev. Stat., Sec. 1211; West Virginia Code, Sec. 5726; Wisconsin Stat. Ann., Sec. 325.16; and Wyoming C. Stat., Secs. 3-2003, 2004.

treated differently than any other ordinary plaintiff, or differently than the defendant in this action.

If no reason or rational basis exists, she is denied her constitutional, property and personal, rights by arbitrary classification contrary to the Fourteenth Amendment of the United States Constitution.

Conclusion.

In view of the fact that Code of Civil Procedure of California, section 1880(3), by its very words, and by its interpretation by the highest courts of the State, does not restrict its application to personal transactions with decedent or similar words, as applied in this case, then, section 1880(3) is unconstitutional as applied in this case, as being in violation of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Such interpretation by the California courts has no reasonable support for the proposition that there is any reasonable possibility, that appellant if allowed to testify in person would perjure herself, or that decedent's estate would be defrauded by appellant.

Appellant respectfully submits that the Motion to Dismiss should be denied and the case heard on briefs and oral arguments.

Respectfully submitted,

GRACE CORSO,

Appellant pro se.